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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

## IN RE CARRIER IQ PRIVACY LITIGATION

No. 12-md-2330-EMC

**NOTICE OF MOTION AND MOTION  
FOR APPOINTMENT OF HAGENS  
BERMAN SOBOL SHAPIRO LLP AND  
PEARSON, SIMON, WARSHAW &  
PENNY, LLP AS INTERIM CO-LEAD  
COUNSEL; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

Date: July 12, 2012  
Time: 2:30 p.m.  
Courtroom: 5 - 17th Floor  
Judge: Hon. Edward M. Chen

DATE ACTION FILED: Dec. 1, 2011

### This Document Relates to:

## ALL ACTIONS

1  
2                   **NOTICE OF MOTION AND MOTION**  
3

4                 PLEASE TAKE NOTICE that on July 12, 2012, at 2:30 p.m. or as soon thereafter as the  
5 matter may be heard by the Honorable Edward M. Chen of the United States District Court of the  
6 Northern District of California, San Francisco Division, located at 450 Golden Gate Avenue, San  
7 Francisco, California, Courtroom 5, 17th Floor, Hagens Berman Sobol Shapiro LLP and Pearson,  
8 Simon, Warshaw & Penny, LLP will and hereby do move the Court pursuant to Federal Rule of  
Civil Procedure 23(g)(3) for an order appointing interim co-lead counsel.

9                 This motion is based on this Notice of Motion and Motion for Appointment of Hagens  
10 Berman Sobol Shapiro LLP and Pearson, Simon, Warshaw & Penny, LLP as Interim Co-Lead  
11 Counsel, the following memorandum of points and authorities, the declarations in support thereof,  
12 the pleadings and the papers on file in this action, and such other matters as the Court may  
13 consider.

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## I. INTRODUCTION

Pursuant to Rule 23(g) of the Federal Rules of Civil Procedure and this Court’s orders of May 1, 2012, and May 24, 2012, Steve W. Berman of Hagens Berman Sobol Shapiro LLP (“Hagens Berman”) and Bruce L. Simon of Pearson, Simon, Warshaw & Penny, LLP (“Pearson Simon”) seek appointment as interim co-lead class counsel for the proposed class in this consolidated multidistrict litigation (“MDL”). The essential inquiry for the Court is to determine which lawyers will best represent the interests of the class while meeting the goals of efficiency and economy. The two firms proposed here, in cooperation with a thoughtfully selected executive committee, are particularly well-suited to this task.

*First*, these firms have a proven track record of experience, knowledge, commitment of resources, and success in large consumer class-action cases. Both firms have been recognized repeatedly for their tireless efforts on behalf of plaintiffs in numerous landmark cases, and Mr. Berman and Mr. Simon are well-recognized as national leaders in the field. In fact, the movants have been involved in many of the largest consumer class actions in America, and they have recovered some of the most significant settlements in history on behalf of various classes.

*Second*, the teams of attorneys that Hagens Berman and Pearson Simon have assigned to this matter include members with substantial experience in privacy and high-tech related litigation. Further, all team members are well-experienced in the prosecution of large consumer class-action cases with multiple defendants and difficult issues at their core. Thus, both firms bring the substantive skills necessary to lead this legally and technically complex case. Additionally, Hagens Berman alone has retained Trevor Eckhart, the independent researcher whose investigation broke the Carrier IQ story, as a consulting expert. His retention adds greatly to the technical expertise that Hagens Berman and Pearson Simon will bring to the table as co-leads.

Hagens Berman and Pearson Simon were among the first firms to which defendants reached out when requesting a stay pending the JPML decision-making process, when preparing the pleadings to effect that stay, and when working out the terms of the joint report presented to the Court in advance of the initial case management conference. And since the early days of this litigation, these firms have coordinated conferences among plaintiffs' counsel to discuss

1 substantive and procedural issues important to this case. They have been active leaders in this  
 2 matter since its inception. As this Court has recognized, appointing lead counsel will assist in  
 3 streamlining the prosecution of this complex matter. Hagens Berman and Pearson Simon, which  
 4 have a long history of working together effectively, stand ready and able to act as co-lead counsel  
 5 in this matter. They ask respectfully that the Court appoint them to serve in this capacity.<sup>1</sup>

## 6 II. PROCEDURAL HISTORY

### 7 A. The CIQ controversy and the firms' responses on behalf of consumers

#### 8 1. Revelations regarding CIQ and the firms' complaints on behalf of consumers

9 The suits at issue were filed on behalf of mobile phone users whose devices bear software  
 10 designed and sold by Carrier IQ, Inc. (sometimes "CIQ"). News that CIQ software was enabling  
 11 serious breaches of privacy broke in November 2011, thanks to the work of an independent  
 12 researcher, Trevor Eckhart.

13 In November 2011 Mr. Eckhart published via his website,  
 14 <http://www.androidsecuritytest.com>, his discovery of CIQ software on his HTC brand cellular  
 15 smartphone. Mr. Eckhart described the CIQ software as a "rootkit," which, by a *Wikipedia*  
 16 definition, "is software that enables continued privileged access to a computer while actively  
 17 hiding its presence from administrators by subverting standard operating system functionality or  
 18 other applications."<sup>2</sup>

19 Mr. Eckhart revealed that the CIQ software on his device provided no notice that it was  
 20 embedded and operating. He also showed that his CIQ-bearing phone was logging keystrokes,  
 21 numbers dialed, SMS text messages, and secure, *i.e.*, HTTPS, website log-ins and search terms.<sup>3</sup>

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22  
 23  
 24 <sup>1</sup> Because of their history of effective cooperation in large, complex matters such as this one,  
 25 the firms ask respectfully that the Court approve their leadership slate as offered. They believe that  
 26 if the Court instead were to marry lawyers from competing leadership applications into a single  
 27 leadership structure, there is a good chance that efficiencies and effectiveness would be lost.

28 <sup>2</sup> Declaration of Steve W. Berman in Support of Motion for Appointment of Hagens Berman  
 29 Sobol Shapiro LLP and Pearson, Simon, Warshaw & Penny, LLP as Interim Co-Lead Counsel  
 ("Berman Decl.") Ex. A (Kenny Complaint), ¶ 22.

<sup>3</sup> Berman Decl. Ex. A, ¶ 23.

1           On November 16, 2011, CIQ sent Mr. Eckhart a cease-and-desist letter, in which it  
 2 demanded that he retract his description of its software as a rootkit, accused him of copyright  
 3 infringement for posting material he found on its website, and threatened severe legal action if he  
 4 did not capitulate to its demands. In response, the Electronic Frontier Foundation (“EFF”) stepped  
 5 up to Mr. Eckhart’s defense and countered with a letter demonstrating that CIQ’s accusations were  
 6 baseless. The EFF demanded on Mr. Eckhart’s behalf that CIQ withdraw its letter and that it cease  
 7 threatening Mr. Eckhart with legal action.<sup>4</sup>

8           On November 23, 2011, CIQ released a statement in which it indicated that it was  
 9 withdrawing its cease-and-desist letter. It called its letter “misguided,” and it indicated that it had  
 10 reached out to Mr. Eckhart and the EFF to apologize. It said it was “deeply sorry for any concern  
 11 or trouble that [its] letter may have caused Mr. Eckhart.”<sup>5</sup>

12           In that same statement, CIQ also described what its software purportedly “does not do and  
 13 what it does.” Among claims of what it supposedly did not do was to “record your keystrokes” or  
 14 “inspect or report on the content of [] communications, such as the content of emails and SMSs.”<sup>6</sup>

15           Mr. Eckhart was not convinced of the truth of these claims, so he analyzed further. On  
 16 November 28, 2011, Mr. Eckhart published on his website a follow-up report entitled *Carrier IQ*  
 17 *Part 2*. His report included a 17 minute video<sup>7</sup> in which he stepped through proof that his CIQ-  
 18 bearing phone did, in fact, log his keystrokes; capture the content of his SMS text messages; record  
 19 dialed numbers; and track his Internet access, including data transmitted via the HTTPS protocol.<sup>8</sup>

20           After publication of *Carrier IQ Part 2* and Mr. Eckhart’s video, the press began to report  
 21 widely on CIQ software and Mr. Eckhart’s work. This ignited a firestorm among mobile phone  
 22 users throughout the country, who took to the Internet to raise serious questions and concerns.<sup>9</sup>

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23           <sup>4</sup> Berman Decl. Ex. A, ¶ 24.

24           <sup>5</sup> Berman Decl. Ex A, ¶ 25.

25           <sup>6</sup> Berman Decl. Ex. A, ¶ 26.

26           <sup>7</sup> This video continues to be available on the YouTube service. As of today’s date, it has  
 27 garnered well over 2 million views. See [http://www.youtube.com/watch?v=T17XQI\\_AYNo](http://www.youtube.com/watch?v=T17XQI_AYNo).

28           <sup>8</sup> Berman Decl. Ex. A, ¶¶ 27-28.

29           <sup>9</sup> See, e.g., Berman Decl. Ex. A, ¶¶ 29-33.

1           Following intense investigation by Hagens Berman and Pearson Simon of the underlying  
 2 facts and law, on December 1, 2011, Hagens Berman filed *Kenny v. Carrier IQ, Inc.*, the first case  
 3 filed nationally in this litigation,<sup>10</sup> in the Northern District of California. In the coming days, it  
 4 filed two more suits in this district: *Thomas v. Carrier IQ, Inc.* and *Fischer v. Carrier IQ, Inc.* All  
 5 told, Hagens Berman represents 22 plaintiffs in these suits – more than any other single firm  
 6 involved –from all regions of the country.

7           On December 2, 2011, Pearson Simon filed *Pipkin v. Carrier IQ, Inc.* in this judicial  
 8 district. Pearson Simon brought *Pipkin* on behalf of two California residents.<sup>11</sup> And other  
 9 plaintiffs in the days, weeks, and months to follow filed other suits now transferred to this Court  
 10 for MDL proceedings.

11           **2. Engagement of Mr. Eckhart as a consulting expert**

12           The firms have continued their investigative work since filing their clients' complaints.  
 13 Naturally, part of this effort was to reach out to Mr. Eckhart. Because of relationships that Hagens  
 14 Berman attorneys have cultivated with lawyers at the EFF, Hagens Berman was able to reach out to  
 15 the EFF for an introduction to Mr. Eckhart. While other plaintiffs' firms reached out to Mr.  
 16 Eckhart as well, Hagens Berman alone succeeded in retaining Mr. Eckhart as a consulting expert.<sup>12</sup>

17           **B. MDL transfer proceedings**

18           On December 2, 2011, Pearson Simon, on behalf of the *Pipkin* plaintiffs, filed a motion to  
 19 transfer the CIQ related cases to the Northern District of California – where more suits than any  
 20 other judicial district had been filed; where CIQ is located; and where relevant witnesses and  
 21 documents are located – for coordinated or consolidated pretrial proceedings. On December 27,  
 22 2011, Hagens Berman, on behalf of the *Kenny*, *Thomas*, and *Fischer* plaintiffs, filed a  
 23 memorandum in support of that motion and in opposition to competing motions to transfer the

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24  
 25           <sup>10</sup> That same day, the *Janek* and *Elliott* cases also were filed in the Northern District of Illinois  
 and the Eastern District of Missouri, respectively, by other plaintiffs and counsel.

26           <sup>11</sup> Declaration of Bruce L. Simon in Support of Motion for Appointment of Hagens Berman  
 27 Sobol Shapiro LLP and Pearson, Simon, Warshaw & Penny, LLP as Interim Co-Lead Counsel  
 ("Simon Decl."), Ex. A (*Pipkin* complaint).

28           <sup>12</sup> Berman Decl., ¶ 2.

1 cases to the Central District of California, the Northern District of Illinois, and the District of  
 2 Delaware. The JPML issued its decision on April 16, 2012, selecting this Court to oversee  
 3 coordinated or consolidated pretrial matters in this case.<sup>13</sup>

### 4 III. ARGUMENT

5 Fed. R. Civ. P. 23(g)(3) provides that a court “may designate interim counsel to act on  
 6 behalf of the putative class before determining whether to certify the action as a class action.” The  
 7 goal is to determine who best will represent the interests of the class, and who best will be able to  
 8 accomplish the goals of efficiency and economy in doing so.<sup>14</sup> Where, as here, multiple cases are  
 9 pending, appointment of class counsel is necessary to protect the interests of class members.<sup>15</sup>

10 Rule 23 and the pertinent orders of this Court provide a number of specific factors that will  
 11 be considered in selecting interim class counsel.<sup>16</sup> These factors include: (a) counsel’s willingness  
 12 and availability to commit to a time-consuming project; (b) counsel’s ability to work co-  
 13 operatively with others; (c) counsel’s qualifications, including experience in managing complex  
 14 litigation and knowledge of the subject matter; (d) counsel’s efforts in researching and  
 15 investigating the claims before the court; (e) the resources that can be contributed to the litigation;  
 16 (f) counsel’s anticipated litigation and discovery plan for the MDL; (g) steps, procedures, and  
 17 guidelines counsel intend to implement to control fees and costs, minimize duplication, and

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18       <sup>13</sup> In spite of every reasonable vector pointing to the Northern District of California as the  
 19 proper place for MDL consolidation, the plaintiffs represented by Strange & Carpenter, which is  
 20 contesting for leadership, filed a brief opposing consolidation in this judicial district and seeking  
 21 consolidation in the Central District of California, where Strange & Carpenter’s only office is  
 22 located. These plaintiffs indicated their belief that CIQ has “an incestuous business relationship”  
 23 with a non-party company based in the Central District of California that supposedly justified  
 24 transfer of these cases there, where only a few cases were pending (and nowhere near the number  
 25 filed here). (Clark Br. at 4 (MDL 2330 ECF No. 11).) But CIQ responded to these plaintiffs’  
 26 beliefs and speculation with a declaration stating unequivocally that it has no business relationship  
 27 with the Orange County company referenced by these plaintiffs. (*See generally* CIQ Coward Decl.  
 28 (MDL 2330 ECF No. 73-3).) In the end, the JPML ignored these plaintiffs’ contentions and instead  
 transferred the related cases to this district, where the true center of gravity of this litigation lies.

19       <sup>14</sup> *See Coleman v. General Motors Acceptance Corp.*, 220 F.R.D. 64, 100 (M.D. Tenn. 2004);  
 20 *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221 (2004) (“MANUAL”).

21       <sup>15</sup> *Donaldson v. Pharmacia Pension Plan*, 2006 U.S. Dist. LEXIS 28607, at \*2-3 (S.D. Ill. May  
 22 10, 2006); *see also* *In re Air Cargo Shipping Servs. Antitrust Litig.*, 240 F.R.D. 56 (E.D.N.Y.  
 23 2006).

24       <sup>16</sup> *See* FED. R. CIV. P. 23(g)(1)(A); Pretrial Order, ECF No. 20, May 1, 2012; Order re Briefing  
 25 on Plaintiffs’ Motion to Appoint Lead Counsel, ECF No. 60, May 24, 2012.

1 maximize efficiency; (h) counsel's fee structure and anticipated costs; (i) counsel's plan for  
 2 allocating work among the leadership team and with other counsel; and (j) counsel's proposed  
 3 structure of the executive committee.<sup>17</sup> Hagens Berman and Pearson Simon satisfy these criteria.

4 **A. The proposed interim co-lead class counsel are willing and available to commit to the time-consuming project of leading this case.**

5 More than most, Hagens Berman and Pearson Simon have demonstrated they are willing to  
 6 commit the resources and time necessary to litigate a complex class action such as this one. For  
 7 over a decade, Hagens Berman has acted as co-lead counsel in the *In re Pharm. Indus. Average*  
 8 *Wholesale Price* MDL litigation, and it acted as lead counsel in the time-and-resource intensive  
 9 *Schwab* securities litigation discussed below. Pearson Simon is serving as co-lead counsel in the  
 10 longstanding *In re TFT-LCD (Flat Panel) Antitrust Litig.*, which after more than five years of  
 11 litigation is currently in trial in this judicial district. Also, Hagens Berman and Pearson Simon both  
 12 have held leadership roles in the long-running *DRAM* and *SRAM* cases in this district.<sup>18</sup> As these  
 13 few of many available examples illustrate, Hagens Berman and Pearson Simon are willing and able  
 14 to commit to the time-consuming project of leading this case.

15 **B. The proposed interim co-lead class counsel affirm that they are able to work  
 16 cooperatively with others in this matter.**

17 While the two firms proposed here believe they can provide the most fair and adequate  
 18 leadership structure for the class, they have an inclusive management style whereby they will seek  
 19 the participation of the many other firms involved in this litigation. Proposed interim co-lead class  
 20 counsel are committed to a cooperative approach among all counsel and, with the permission of the  
 21 Court, they will work to establish an executive committee of counsel to ensure that the class is

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22       <sup>17</sup> The Court's May 1, 2012 pretrial order also requested that the parties address the ability to  
 23 maintain reasonable fees and expenses. Because this factor is subsumed in the Court's more  
 24 specific categories in the May 24, 2012 order, the movants do not address it separately.

25       <sup>18</sup> These references are to *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 02-  
 26 cv-1486PJH (N.D. Cal.) and *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 07-cv-  
 27 01819-CW (N.D. Cal.). In *DRAM*, which was filed in October 2002 and concluded in  
 28 approximately 2006, Hagens Berman acted as co-lead counsel for direct purchasers and Pearson  
 Simon acted as an executive committee member. As of the end of 2011, *DRAM* had resulted in the  
 recovery of over \$325 million in settlement funds. And in *SRAM*, which was filed in February  
 2007 and concluded in approximately 2010, both firms acted as executive committee members. As  
 of the end of 2011, *SRAM* had resulted in the recovery of over \$75 million in settlement funds.

1 adequately represented. In doing so, proposed interim co-lead class counsel will use all efforts to  
 2 avoid waste and duplication in favor of efficiency.

3       **C. The proposed interim co-lead class counsel have substantial experience handling  
 4 complex consumer class actions; they have served as co-lead counsel in numerous  
 consumer class actions; and they are knowledgeable about the applicable law.**

5           As the following discussion and the attachments to the Berman and Simon declarations  
 6 illustrate, Hagens Berman and Pearson Simon have substantial experience handling complex  
 7 consumer class actions; they have served as lead or co-lead counsel in numerous consumer class  
 8 actions; and they are highly knowledgeable regarding the applicable law.

9           **1. Hagens Berman Sobol Shapiro**

10          Hagens Berman is a fifty-five lawyer firm, with offices in New York, Seattle, Washington  
 11 D.C., Boston, Berkeley, Los Angeles, Phoenix, Minnesota, and Colorado. Since its founding in  
 12 1993, Hagens Berman has represented plaintiffs in a broad spectrum of complex, multi-party  
 13 antitrust cases. The firm has been recognized in courts throughout the United States for its ability  
 14 and experience in handling major class litigation.<sup>19</sup> Hagens Berman will devote the resources  
 15 necessary to prepare this matter aggressively for trial. To do so, the firm will rely on several of the  
 16 firm's most experienced litigators and trial lawyers, including:

17           ➤ **Steve W. Berman:**

18          Mr. Berman helped found the firm in 1993, and he is its managing partner. He has served  
 19 as lead or co-lead counsel in antitrust, securities, consumer, and products liability litigation, as well  
 20 as other complex litigation, including MDL actions, throughout the country. For example, Mr.  
 21 Berman was the lead trial lawyer in *In re Pharm. Indus. Average Wholesale Price Litig.*, MDL No.  
 22 1456 (D. Mass.). He tried the class case against four manufacturers and successfully argued the  
 23 appeal from the trial before the First Circuit. Mr. Berman was also the lead counsel in *New*  
 24 *England Carpenters v. First DataBank, et al.*, No. 05-11148-PBS (D. Mass.), on behalf of a  
 25 nationwide class of private payors that purchased prescription brand-name drugs. In that case,  
 26 Hagens Berman achieved a \$350 million settlement eleven days before trial was scheduled to start.

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 28       <sup>19</sup> See generally Berman Decl. Ex. B.

1 Additionally, Mr. Berman was lead counsel in *In re Charles Schwab Corp. Secs. Litig.*, No. 08-cv-  
 2 01510 (N.D. Cal.), a recent securities class action before the Hon. William Alsup, that settled on  
 3 the eve of trial, while the parties were arguing *in limine* motions, for some \$235 million. This  
 4 resulted in a 42.5% recovery for the federal class and an 80% recovery for the California class.

5 Recently, in *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and*  
 6 *Prods. Liab. Litig.*, No. 8:10ML2151 JVS (FMOx) (C.D. Cal.), Judge James V. Selna *sua sponte*  
 7 identified Mr. Berman as a presumptive co-lead counsel when Judge Selna was assigned the  
 8 Toyota MDL.<sup>20</sup> And even more recently, Mr. Berman and Hagens Berman were appointed co-lead  
 9 counsel in the *In re Electronic Books Antitrust Litigation*, No. 1:11-md-02293(DLC) (S.D.N.Y.).

10 Perhaps most notable is Mr. Berman's role as a special assistant attorney general for the  
 11 states of Washington, Arizona, Illinois, Indiana, New York, Alaska, Idaho, Ohio, Oregon, Nevada,  
 12 Montana, Vermont, and Rhode Island in the landmark Tobacco Litigation. That case resulted in  
 13 the largest settlement in history, a settlement that occurred while Mr. Berman was in trial in *State*  
 14 *of Washington v. Philip Morris, et al.*

15 ➤ **Jeff D. Friedman:**

16 Mr. Friedman is a member of Hagens Berman and former Assistant United States Attorney  
 17 (“AUSA”), Criminal Division, for the United States Attorney’s Office, Central District of  
 18 California. As an AUSA, Mr. Friedman tried numerous jury trials and prosecuted complex white  
 19 collar fraud cases and cases against large narcotics organizations. Mr. Friedman’s experience as  
 20 lead or co-lead counsel in cases in the media and technology sector includes: *In re Electronic*  
*Books Antitrust Litig.*, No. 11-mc-02293 (S.D.N.Y.); *In re Optical Disk Drive Prods. Antitrust*  
*Litig.*, No. 10-cv-2143-CW (N.D. Cal.); *Pecover v. Electronic Arts, Inc.*, No. 08-cv-2820-RS (N.D.  
 21 Cal.); and *In re eBay Sellers Antitrust Litig.*, No. 07-cv-1882-JF (N.D. Cal.). Mr. Friedman has  
 22 participated in numerous cases involving consumers’ privacy rights, including the ground breaking  
 23 case *In re National Security Agency Telecomm. Record Litig.*, No. 3:06-md-1791 (N.D. Cal.) and  
 24 the *In re Sony BMG Audio Compact Disc Litig.*, 1:05-cv-09575-NRB (S.D.N.Y.).

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<sup>20</sup> Strange & Carpenter sought a lead position as well, but its request was denied.

1           **2. Pearson, Simon, Warshaw & Penny**

2           Pearson Simon is a civil litigation firm that specializes in class actions, with offices in San  
 3 Francisco and Los Angeles. Pearson Simon handles national and multi-national class actions that  
 4 present cutting-edge issues in both substantive and procedural areas. The firm's attorneys have  
 5 expertise in litigating difficult and large cases in an efficient and cost-effective manner.  
 6 Recognized as national leaders in the field of class actions, they have obtained hundreds of millions  
 7 of dollars in settlements and verdicts on behalf of their clients. Attorneys at PSWP currently serve  
 8 as co-lead counsel in such prominent cases as *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No.  
 9 3:07-md-01827-SI (N.D. Cal.) and *Wolph v. Acer Am. Corp.*, No. C-09-01314 (N.D. Cal.), and  
 10 hold, or have held, leadership roles in various other notable complex litigation and class-action  
 11 cases.<sup>21</sup> The attorneys who will be primarily responsible for the adjudication of this case are:

12           ➤ **Bruce L. Simon:**

13           Mr. Simon specializes in complex cases involving antitrust, securities, and consumer  
 14 protection laws. Mr. Simon has served as lead or co-lead counsel in several nationwide class  
 15 actions, including *In re Sodium Gluconate Antitrust Litigation*, MDL No. 1226 (N.D. Cal.), an  
 16 antitrust case involving a food additive product; *In re Methionine Antitrust Litigation*, MDL No.  
 17 1311 (N.D. Cal.), an antitrust class action that resulted in over \$100 million in settlements; and *In*  
 18 *re Citric Acid Antitrust Litigation*, MDL No. 1092 (N.D. Cal.), which resulted in over \$80 million  
 19 in settlements for direct purchasers. Mr. Simon also served as co-chair of discovery and as a  
 20 member of the trial preparation team in *In re Dynamic Random Access Memory (DRAM) Antitrust*  
 21 *Litigation*, MDL No. 1486 (N.D. Cal.), which settled for over \$325 million to the direct purchaser  
 22 class. In that case, Mr. Simon was one of the principal attorneys involved in supervising the  
 23 review of a multi-million page electronic document production and the taking of over 100  
 24 depositions, all in coordination with the indirect purchaser plaintiffs and the government.

25           Currently, Mr. Simon is serving as co-lead counsel for the direct purchaser plaintiffs in *In*  
 26 *re TFT-LCD (Flat Panel) Antitrust Litigation*, which has partially settled for \$405 million and is

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 28           <sup>21</sup> See generally Simon Decl. Ex. B.

1 currently in trial with the last remaining defendant, Toshiba. He also recently has been appointed  
 2 interim co-lead counsel in *In re Hawaiian and Guamanian Cabotage Antitrust Litigation*, MDL  
 3 No. 1972 (W.D. Wash.), and *In re Potash Antitrust Litigation (II)*, MDL No. 1996 (N.D. Ill.).  
 4 Most recently, Mr. Simon was appointed chairman of a five-firm committee serving as interim co-  
 5 lead counsel in *Sledge v. Warner Music Group Corp.*, No. 12-cv-00559-RS (N.D. Cal.).

6           ➤ **Daniel L. Warshaw:**

7           Mr. Warshaw is a partner at Pearson Simon who has significant experience in complex  
 8 cases involving high-technology and consumer issues. Mr. Warshaw currently serves as co-lead  
 9 counsel in *Wolph v. Acer America Corp.*, a nationally certified class action involving defective  
 10 Acer computers, and as interim co-lead counsel in *James v. UMG Recordings, Inc.*, No. 11-cv-  
 11 01613-SI (N.D. Cal.), and *Sledge v. Warner Music Group Corp.*, cases involving complex disputes  
 12 about record companies' payments of royalties to artists. In fact, Mr. Warshaw was recently  
 13 profiled in the *Daily Journal* for his instrumental role in bringing such royalties cases on behalf of  
 14 artists across the country. Mr. Warshaw has also held integral roles in the *In Re CRT Antitrust*  
 15 *Litigation* and *In re TFT-LCD (Flat Panel) Antitrust Litigation* matters.

16           **D. Hagens Berman and Pearson Simon have done significant work in identifying and  
 17 investigating current and potential claims.**

18           At the end of November 2011, news broke hard regarding Trevor Eckhart's work to  
 19 uncover the privacy issues at the core of this case. Before filing *Kenny, Thomas, Fischer, and*  
*Pipkin*, Hagens Berman and Pearson Simon undertook intense investigation and analysis of the  
 20 available evidence and intense study of pertinent law for the purpose of identifying the claims to be  
 21 brought in those initial complaints.

22           These firms' work has continued. By way of example, Hagens Berman submits a  
 23 description of some of its continued investigatory efforts in the *Ex Parte In Camera* Declaration of  
 24 Steve W. Berman in Support of Application to Appoint Hagens Berman and Pearson Simon as  
 25 Interim Co-Lead Counsel. This declaration is submitted *ex parte in camera*, along with a motion to  
 26 seal, because the firm's efforts involve privileged work-product and confidential information.

1 Furthermore, Hagens Berman's engagement of Mr. Eckhart as a consulting expert will  
 2 provide vital ongoing assistance in the prosecution of class claims against the defendants. Already,  
 3 consultation with Mr. Eckhart has strengthened the firm's grasp on the technical matters at issue  
 4 here, which will add greatly to the movants' ability early-on to lead in the fashioning of the  
 5 consolidated amended complaint and the best possible discovery requests, as well as in the ongoing  
 6 conduct of this case.<sup>22</sup>

7 **E. Hagens Berman and Pearson Simon have and will dedicate the resources necessary to  
 8 prosecute this action.**

9 As illustrated in the firm resumes attached as Exhibits B to the Berman and Simon  
 10 declarations, the proposed lead firms have many years of litigation experience and numerous  
 11 attorneys in offices around the country. They have performed substantial work in investigating the  
 12 merits of this case, and they have the resources to continue to do so through motion practice,  
 13 discovery, class certification, and trial. They have an unparalleled reputation in representing  
 14 nationwide classes and are well-equipped to do so here. Furthermore, both Hagens Berman and  
 15 Pearson Simon are located in the Bay Area, which will further facilitate the efficient scheduling of  
 16 hearings, conferences, and other activities with the Court and defense counsel.

17 With specific regard to having the resources and will to take cases to trial when necessary,  
 18 both firms can support their claims with concrete evidence. As of the time of submittal of this  
 19 memorandum, Mr. Simon and his firm are in trial as co-lead counsel in *In re TFT-LCD (Flat  
 20 Panel) Antitrust Litigation* before Judge Ilston of this judicial district. Many believe this case to be  
 21 one of the largest antitrust price-fixing cases currently pending in the United States.

22 As for Hagens Berman, it is one of the few plaintiffs' firms in the United States that often  
 23 has taken complex civil litigation, including class actions, to trial. Recent cases that Hagens  
 24 Berman has tried include *In re Neurontin Mktg., Sales Practices, and Prods. Liab. Litig.* (D. Mass.  
 25 MDL No. 1629); *Williams v. The Boeing Company*, No. C98-761 P (W.D. Wash.); *In re Burlington  
 26 N. & Santa Fe Railway Co. Emp. Settlement Agreements Litigation* (W.D. Wash.); and *In re*

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27       <sup>22</sup> Other counsel, including Strange & Carpenter, have no relationship with Mr. Eckhart, so that  
 28 if Strange & Carpenter's leadership bid were granted, the class would be disadvantaged.

1       *Pharm. Indus. Average Wholesale Price Litig.*, where Hagens Berman faced four major  
 2 pharmaceutical manufacturers as opponents.<sup>23</sup>

3       **F.      Hagens Berman and Pearson Simon's anticipated litigation and discovery plan**

4       Hagens Berman and Pearson Simon have decades of experience in organizing and  
 5 conducting litigation and discovery in multi-party litigation such as this. The firms propose the  
 6 following types of mechanisms to ensure efficient coordination of these actions.

- 7           • all parties must attend and participate in discovery meetings, when requested, to ensure  
           efficient planning and phasing of discovery and maximum coordination between  
           parties;
- 8           • within 14 days of the filing of amended pleadings, each party must serve: (i) initial  
           disclosures; (ii) a list of custodians whose files will be searched for responsive  
           documents, including the name, employer, current title, and dates of employment; and  
           (iii) if any party intends to use search terms, a list of the proposed search terms and a  
           means for testing the adequacy of any such terms;
- 9           • within 30 days of the filing of amended pleadings, counsel will meet and confer  
           regarding: (i) a protective order to govern the production of confidential information;  
           (ii) a protocol for the production of electronically stored information; (iii) if any party  
           intends to use search terms, a list of the proposed search terms and a means for testing  
           the adequacy of any such terms; (iv) the adequacy of each party's custodian list; and (v)  
           the adequacy of any proposed search terms.

10       If appointed, the firms will, at the appropriate time, negotiate with defendants and present to the  
 11 Court a pretrial order and schedule proposing exactly these types of efficient procedures.

12       **G.      Hagens Berman and Pearson Simon's proposed procedures and guidelines to  
           maximize efficiency**

13       Hagens Berman and Pearson Simon commit to staff and litigate this action efficiently. For  
 14 example, with respect to the efficient and cost-effective review of electronically stored information,  
 15 Hagens Berman has a commercial relationship with an online document-review company that will  
 16 enable online review of documents from anywhere in the country, ensuring the adequate staffing of  
 17 document reviews through the use of different offices of the co-lead counsel as well as the possible  
 18 use of contract attorneys. This commercial vendor has guaranteed to match the lowest bid of a  
 19

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20       <sup>23</sup> By contrast, the resume that Mr. Strange has posted to his firm's website reveals no class-  
 21 action trial experience. <http://www.strangeandcarpenter.com/Attorneys/Brian-R-Strange.shtml>

1 comparable vendor after a market survey of online document review tools. In past cases, this  
 2 commercial relationship has provided savings of tens of thousands of dollars to class members.

3 **H. Hagens Berman and Pearson Simon's proposed fee structure and anticipated costs**

4 Employing bidding procedures for the position of lead counsel fosters competition amongst  
 5 counsel by attempting to replicate the private marketplace for legal services. *See In re Oracle Sec.*  
 6 *Litig.*, 131 F.R.D. 688, 690 (N.D. Cal. 1990). In the competitive bidding process, the Court's task  
 7 is to "approximate as closely as possible the attorney selection and fee bargain that the class itself  
 8 would strike if it were able to do so."<sup>24</sup> The Court stands "in the position of an intermediary acting  
 9 for the class members in establishing rates."<sup>25</sup> In considering competitive bids from counsel,  
 10 "[j]udges don't look for the lowest bid; they look for the best bid – Just as any private individual  
 11 would do in selecting a law firm, an advertising firm, or a construction company."<sup>26</sup> But the  
 12 relationship between attorneys' fees and recovery to the class is a complex one, where courts often  
 13 strive to align the interests of counsel and the class.

14 *Proposed fee structure:* In accordance with the belief "that a 'percentage of recovery fee'  
 15 calculation holds the best promise of harmonizing the interests of the class and its future  
 16 counsel,"<sup>27</sup> counsel here propose that they will not seek in excess of the 25 percent benchmark  
 17 followed in the Ninth Circuit.<sup>28</sup>

18 *Anticipated costs:* Hagens Berman and Pearson Simon believe that the largest anticipated  
 19 costs in this case will be the costs of electronic discovery and the costs of experts in this litigation.  
 20 As outlined above, Hagens Berman has a commercial relationship with an online vendor that will  
 21 ensure the lowest prices possible for the class on a quality online document-review tool.

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22  
 23       <sup>24</sup> *In re Wells Fargo Sec. Litig.*, 156 F.R.D. 223, 225 (N.D. Cal. 1994) (citation omitted).

24       <sup>25</sup> *In re Amino Acid Lysine Antitrust Litig.*, 918 F. Supp. 1190, 1194 (N.D. Ill. 1996).

25       <sup>26</sup> *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 720 (7th Cir. 2001).

26       <sup>27</sup> *Wenderhold v. Cylink Corp.*, 188 F.R.D. 577, 587 (N.D. Cal. 1999).

27       <sup>28</sup> *See, e.g., In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011)  
 28 ("[C]ourts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award,  
 providing adequate explanation in the record of any 'special circumstances' justifying a  
 departure.") (citations omitted).

1 Moreover, because the firms already have devoted significant time to investigation in this matter,  
 2 many of the costs inherent to a case such as this already have been incurred.

3 **I. Hagens Berman and Pearson Simon's plan for allocation of work**

4 Hagens Berman and Pearson Simon make this proposal as proposed co-lead counsel. Given  
 5 the long-standing history and cooperation between them, counsel propose to allocate work between  
 6 the two co-lead firms equally. They also propose to select four firms (named below) to assist, as  
 7 they determine is necessary and efficient, for prosecuting this matter on behalf of the class. These  
 8 firms, which will form an executive committee, will be paid from lead counsel's fees.<sup>29</sup>

9 Respectfully, the firms submit that liaison counsel is not needed in this case. In its order  
 10 dated May 5, 2012, this Court contemplated the appointment of liaison counsel to receive order and  
 11 notices from the Court, to maintain complete files with copies of all documents, and to receive  
 12 orders from the MDL Panel.<sup>30</sup> With the advent of the Court's Electronic Case Filing system, the  
 13 MDL Panel's movement to the same system, and the ability of all counsel to maintain electronic  
 14 files, the appointment of liaison counsel is unnecessary. And to the extent that this Court  
 15 envisioned a liaison counsel to be a "tiebreaker," as referenced at the May 24, 2012, case  
 16 management conference,<sup>31</sup> Hagens Berman and Pearson Simon believe that no such tiebreaker vote  
 17 is required. Should these two firms be unable to reach agreement on litigation strategy (an unlikely  
 18 event), they pledge to consult the executive committee for the tiebreaking vote.

19 Finally, in its May 5, 2012 order, the Court outlined the proposed duties of lead counsel.<sup>32</sup>  
 20 Hagens Berman and Pearson Simon agree with the proposed duties as outlined in the Court's order.

21 **J. Hagens Berman and Pearson Simon's proposed executive committee**

22 This Court has requested counsel's views on the size and specific role of the executive  
 23 committee. The MANUAL FOR COMPLEX LITIGATION recognizes that there can be multiple lead  
 24

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25       <sup>29</sup> See *Wenderhold*, 188 F.R.D. at 587-88.

26       <sup>30</sup> Pretrial Order, ECF No. 20, filed May 5, 2012 at 6.

27       <sup>31</sup> Transcript, May 24, 2012 Case Management Conference at 16:6-12.

28       <sup>32</sup> Pretrial Order, ECF No. 20, filed May 5, 2012 at 7.

1 counsel and an executive committee, particularly in large cases.<sup>33</sup> This is a large case. Also, there  
 2 can be no question that the factual and legal issues in this case are complex. Plaintiffs allege  
 3 electronic privacy violations. The legal theories and evidence in support thereof will require  
 4 technical expertise as well as extensive legal analysis.

5 Hagens Berman and Pearson Simon propose an executive committee of four firms: (1)  
 6 Arias Ozzello & Gignac LLP; (2) Levin, Fishbein, Sedran & Berman; (3) Finkelstein Thompson  
 7 LLP; and (4) Kiesel, Boucher Larson LLP. These firms have been selected on the basis of their  
 8 expertise not only in class actions, but also in privacy and complex consumer actions.<sup>34</sup> In  
 9 accordance with the MANUAL FOR COMPLEX LITIGATION, the executive committee will: “from time  
 10 to time consult with plaintiffs’ lead . . . counsel in coordinating the plaintiffs’ pretrial activities and  
 11 in planning for trial.”<sup>35</sup> This will include direct assignments from co-lead counsel (both by  
 12 defendant and subject matter), but will also include consultation for large strategic decisions.

13 Hagens Berman and Pearson Simon propose to collect reports of contemporaneously  
 14 prepared attorney and paralegal time and expense records from the executive committee members.  
 15 The collection and review of these records will ensure not only that the time expended by counsel  
 16 was at the direction of lead counsel, but also that the time expended by any firm was reasonable.

#### 17 IV. CONCLUSION

18 For the foregoing reasons, Steve W. Berman of Hagens Berman and Bruce L. Simon of  
 19 Pearson Simon respectfully request appointment as interim co-lead class counsel.

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22       <sup>33</sup> See MANUAL, § 10.221.

23       <sup>34</sup> For details of these firms’ expertise, *see generally* the Declaration of J. Paul Gignac in  
 24 Support of Motion for Appointment of Hagens Berman Sobol Shapiro LLP and Pearson, Simon,  
 25 Warshaw & Penny, LLP as Interim Co-Lead Counsel; the Declaration of Charles E. Schaffer in  
 26 Support of Motion for Appointment of Hagens Berman Sobol Shapiro LLP and Pearson, Simon,  
 27 Warshaw & Penny, LLP as Interim Co-Lead Counsel; the Declaration of Rosemary M. Rivas in  
 28 Support of Motion for Appointment of Hagens Berman Sobol Shapiro LLP and Pearson, Simon,  
 Warshaw & Penny, LLP as Interim Co-Lead Counsel; and the Declaration of Paul R. Kiesel in  
 Support of Motion for Appointment of Hagens Berman Sobol Shapiro LLP and Pearson, Simon,  
 Warshaw & Penny, LLP as Interim Co-Lead Counsel, together with their exhibits, filed  
 concurrently herewith.

35       MANUAL, § 40.22.

1 DATED: June 8, 2012

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## **CERTIFICATE OF SERVICE**

I hereby certify that on June 8, 2012, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the e-mail addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List, and I hereby certify that I have cause to be e-mailed a copy of the foregoing document to the non-CM/ECF participants indicated on the Manual Notice List generated by the CM/ECF system.

/s/ Steve W. Berman  
STEVE W. BERMAN

## **GENERAL ORDER 45 ATTESTATION**

I am the ECF User whose ID and password are being used to file this Motion. In accordance with General Order 45, concurrence in the filing of this document has been obtained from each of the signatories and I shall maintain records to support this concurrence for subsequent production for the court if so ordered or for inspection upon request by a party.

Dated: June 8, 2012

HAGENS BERMAN SOBOL SHAPIRO LLP

By: /s/ Steve W. Berman  
Steve W. Berman

Attorneys for Plaintiffs